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JAMES H. McKENNEY,
Clerk.

(19,612.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY, AND THE EQUITABLE TRUST COMPANY OF NEW YORK, PETITIONERS AND COMPLAINANTS,

vs.

NORTHERN SECURITIES COMPANY.

MEMORANDUM ON BEHALF OF COMPLAINANTS.

The exact facts appearing in the record in regard to the conversion of the complainants' original Northern Pacific preferred stock into common stock were not, perhaps, sufficiently explained upon the oral argument.

There is no dispute that on the 18th of November, 1901, the complainants Harriman and Pierce delivered to the Northern Securities Company certificates for $78,108,000 par value of the capital stock of the Northern Pacific Railway Company, consisting of $41,085,000 of preferred stock and

$37,023,000 of common stock, out of a total capital stock of $155,000,000.

The bill alleges and the proofs show that of this preferred stock $34,709,000 was converted into common stock and not retired by the payment of cash (see reply brief, pp. 23-28, and opinion of Judge Bradford, record, pp. 338-341), and that only $6,376,000 was paid off in cash (record, p. 180). The injunction of the circuit court, now before this court for review, covered the original $37,023,000 of common stock delivered by the complainants and the $34,709,000 of new common stock into which the Securities Company had been shown to have converted an equivalent amount of complainants' preferred stock.

If, on final hearing, it shall appear that only $34,709,000 of complainants' preferred stock was actually converted into common stock, as the present proofs tend to establish, the complainants will then only be entitled to the return to them of that stock together with their $37,023,000 original common stock, making in the aggregate $71,732,000, being the exact amount covered by the injunction order of the circuit court. This will be less than a majority of the capital stock of the Northern Pacific Company ($155,000,000, par value), and will result in turning the original majority holding of the Oregon Short Line Company into a minority holding.

Assuming that complainants would have been entitled to the restoration of their preferred stock *if still in existence*, it is submitted that they are entitled to whatever now represents their original property in whatever form it may be. If their preferred stock had actually been paid off and converted into cash and the cash were now in the possession of the Securities Company, they would be entitled only to cash; but if their preferred stock was actually converted into other property, be it now more or less valuable, then they are entitled to the substituted property, no more and no less (complainants' brief, p. 164). If the Northern Pacific

stock had greatly depreciated in value, complainants could not on that ground demand cash.

Moreover, the return to complainants of the $34,709,000 of new common stock, into which their preferred was actually converted, will not place them *in the slightest degree* in a better position than they would have been in if they had never gone into the Northern Securities Company, or it had never been formed.

Under the plan of conversion, the right to obtain new common stock was confined solely to the holders of the existing common stock, of which Messrs. Morgan, Hill and associates then held a majority, in the proportion of seventy-five eightieths of their holdings, that being the proportion of the new to the old common stock. Such proportion of the $37,023,000 par value of old common stock then held by the complainant, Oregon Company, amounted to exactly $34,709,000. In other words, the Oregon Company became entitled, as holder of $37,023,000 of old common stock, to acquire $34,709,000, par value, of new common stock. This would have made them common-stock holders of the Northern Pacific Company to the amount of $71,732,000, being the exact amount covered by the present injunction, and this amount, they assert, they are entitled to have returned to them upon the surrender of the shares of the Northern Securities Company which they received and the return of such an amount in cash as may be equitable.

The proofs before the court indisputably show that the Northern Securities Company actually used the common stock acquired from the complainants, Harriman and Pierce, in order to secure the $34,709,000 of new common stock, which it now holds. The subscription was made on complainants' common stock and was paid for with their preferred stock. Had the Oregon Company then done exactly what the Northern Securities Company itself is admitted to have done, it would have had $71,732,000 out of a total capital of

$155,000,000, and would have received $6,376,000 in cash, being the difference between $34,709,000 of new common stock, to which they were entitled, and their entire holding of $41,085,000 of preferred stock.

The minutes of the meeting of the directors of the Northern Securities Company of November 15, 1901, which Mr. Clough testified in the Government suit had been prepared in blank for the purpose of being submitted to Mr. Harriman (present record, pp. 242–243), expressly provided that the president be authorized to purchase convertible certificates "equal to seventy-five eightieths of the par amount of any and all common stock of the Northern Pacific Railway Company that shall have been acquired by this company," and also authorized to convert the same into common stock "whenever such conversion may be effected" (p. 312).

Thereupon, the following entry was made in the books of the Northern Securities Company, as appears by the affidavit of William Mahl (pp. 177–178), viz.:

> "Upon the journal of said Securities Company, there are two entries reading as follows:
>
> "1901, Nov'b'r 18th.
>
> "Investment Account No. 1—To Capital Stock a/c
>
> | | |
> |---|---|
> | "For 410,850 shs. N. P. pfd. stock bought from E. H. Harriman and Winslow S. Pierce for..... | $41,085,000 |
> | "Less paid in cash as per entry in cash book this day..... | 8,915,629 |
> | "Balance paid in stock..... | $32,169,371 |
>
> "Say 321,693 shs. & $71. scrip issued as fully paid-up stock @ par."

"Nov'b'r 18.

Investment Account No. 2—To Capital Stock a/c.

For 370.230 shs. North'n Pac. common stock purchased from E. H. Harriman & Winslow S. Pierce with the rights conferred thereon by resolution of the directors of the N. P. Ry. Co. adopted Nov. 13th, 1901, and paid for with 503,225.087½ shs. capital stock of Northern Securities Co. issued as fully paid up stock @ par..... 50,322,500.87½ "

"These entries appear to have been regularly carried into the capital and investment accounts of the Securities Company. I was informed by Mr. Nichols that the charges of $32,169,371, and of $50,322,500.87½ on account of the preferred and common stock of the Northern Pacific Railway Company referred to in said entries were merely an arbitrary apportionment of the cost of the entire stock received from Harriman and Pierce.

"The only preferred stock of the Northern Pacific Railway Company which was ever deposited with the Northern Securities Company or passed into its possession, so far as I was able to ascertain from said books was the $41,085,000. par value delivered to it by complainants Harriman and Pierce."

It also appears from the present record that Mr. Clough, one of the directors of the Northern Securities Company, testified, among other things, in the Government suit as follows (pp. 167–168):

"Witness: By the terms of the resolutions of the Northern Pacific Railway Company retiring the preferred stock of that company it was provided that the holders of the then existing common stock of that company of record at a certain future day, which I think now was the 10th of December, 1901, would be

entitled to subscribe at par for convertible bonds that were to be issued by the Northern Pacific Railway Company in the process of retiring the preferred stock to the amount of 75/80 of their holdings in the existing common stock. All stock that was transferred on the record of the Northern Pacific Railway Company prior to the date of the closing of the books, which, as I have stated before, as I remember, was on December 10, would carry with it this right of subscription, so that when the Northern Securities Company purchased the Harriman and Pierce stock, common stock, or any other common stock of the Northern Pacific, prior to December 10, with their purchase they got the right of subscription which the resolutions which I have mentioned gave. Now, does that explain it fully?

"Q. Yes, that explains that portion of it. Now, as a matter of computation, 75/80 of 37,000,000 is about 34,000,000, isn't it?

"A. Yes, sir; it is about 34,000,000. And I think that the subscription right which the Northern Securities Company exercised was obtained by it almost wholly from its purchase of the thirty-seven and odd millions of the Harriman and Pierce stock."

And Mr. Hill, president of the company, testified in the Government suit (present record, pp. 166–167) as follows:

"A. As soon as the notice was given to redeem the preferred stock of the Northern Pacific, my recollection is that a number of the preferred stockholders surrendered their stock, took their certificates for their common and converted them. Now, it may be, and I think quite likely, that that is what was done by Mr. Morgan or his firm with the Harriman preferred stock. I know that others did that."

This $34,709,000 of new common stock is all that now represents the original preferred stock of the complainants. The fact that it is said to have increased in value, which is denied, makes no difference. If it had decreased in value complainants could not then have refused to take it and have

insisted on cash. The courts cannot decree the payment or restoration of $34,709,000 *in cash never received by the Securities Company.* All that can be decreed to be restored is the property into which complainants' original preferred stock was converted.

It is, therefore, submitted that the restoration to the complainants of the $71,732,000 par value of common stock of the Northern Pacific Railway Company, covered by the injunction order before the court, would not place them in any better or different position than they occupied in November, 1901.

WILLIAM D. GUTHRIE,
D. T. WATSON,
Of counsel for petitioners and complainants.

WASHINGTON, March 2, 1905.

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EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners and Appellants,

vs.

NORTHERN SECURITIES COMPANY.

MEMORANDUM IN OPPOSITION TO MOTION FOR IMMEDIATE ISSUE OF MANDATE BEFORE THE FILING OF ANY OPINION.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT.

The appellants in the above-entitled case respectfully ask this Honorable Court not to direct the issue of the mandate on the recent decision herein until after the court has filed its opinion and the grounds of its decision have been disclosed, and the appellants have had an opportunity to examine the same. The immediate issue of the mandate in the case at bar would render the exercise of the right of petition for rehearing, etc., futile and unavailing, because it is the avowed intention of the appellee, Northern Securities Company, forthwith to distribute and dispose of the subject matter of the litigation. It is earnestly submitted that it would be unjust to permit this to be done until the grounds of the decision have been disclosed in the opinion of the

court, and the appellants' counsel have been afforded the opportunity to advise their clients in the light of such opinion.

Washington, D. C., March 17, 1905.

Respectfully submitted,

WM. D. GUTHRIE,
D. T. WATSON,
R. S. LOVETT,
MAXWELL EVARTS.